

PCA CASE N° 2019-46

**IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE
TRADE PROMOTION AGREEMENT BETWEEN THE REPUBLIC OF PERU AND THE
UNITED STATES OF AMERICA**

- and -

THE UNCITRAL ARBITRATION RULES 2013

-between-

THE RENCO GROUP, INC.

-and-

THE REPUBLIC OF PERU

PROCEDURAL ORDER NO. 11

The Arbitral Tribunal

Judge Bruno Simma (Presiding Arbitrator)
Prof. Horacio Grigera Naón
Mr. J. Christopher Thomas KC

26 February 2024

1 Procedural History

- 1.1 Pursuant to the agreement of the Parties, this arbitration (the “**Treaty Case**”) is being coordinated with *The Renco Group, Inc. and Doe Run Resources Corp. v. Republic of Peru and Activos Mineros S.A.C.*, PCA Case No. 2019-47 (the “**Contract Case**”).
- 1.2 On 5 February 2024, the Tribunal, the Parties, and the PCA held a pre-hearing conference by videoconference.
- 1.3 On 7 February 2024, the Tribunal issued Procedural Order No. 10 for the Treaty Case and Procedural Order No. 11 for the Contract Case (the “**Hearing Procedural Orders**”), whereby, *inter alia*, it requested the Parties to submit their final lists of respective participants for the Hearing by the same date. Both Parties complied and submitted their lists accordingly.
- 1.4 By letter dated 7 February 2024, the Tribunal indicated the following:

The Tribunal notes that it has maintained therein – and intends to strictly follow – the rules established in previous Procedural Orders and directions of the Tribunal. Deviations from these rules and the establishment of special rules for the hearing will continue to be considered only as agreed by the Parties or on an exceptional basis following the receipt of a timely reasoned application to the Tribunal.

In particular, the Tribunal recalls and reaffirms the general rules against the admission of evidence prior to and at the Hearing (paragraphs 6.4, 6.5, and 9.1(e) of Procedural Order No. 1 of both cases, and paragraphs 13.1 and 13.5 of Procedural Order No. 10 of the Treaty Case and Procedural Order No. 11 of the Contract Case) and the rules concerning the scope of witness and expert testimony (Sections 7-9 of Procedural Order No. 1 of both cases, and Section 9 and paragraph 13.1 of Procedural Order No. 10 of the Treaty Case and Procedural Order No. 11 of the Contract Case). Given the Claimants’ mention during the pre-hearing conference of a potential need for rebuttal to the Respondents’ latest expert reports, the Claimants are invited to specify, by **Friday, 9 February 2024**, the issues they intend to address in rebuttal and whether the proposed rebuttal will remain within the limits prescribed by the aforementioned rules or whether they intend to submit an application to the Tribunal in this respect.

- 1.5 By letter dated 9 February 2024, the Claimant requested leave to include as exhibits in the record the Special Environmental Assessment of the La Oroya Metallurgical Complex prepared for Peru’s Ministry of Energy and Mines by SVS Ingenieros S.A. in partnership with Golder Associates Brasil Ltda. in June 2003 (the “**SVS Report**”) and documents reporting the updated testing results for blood lead levels produced by the National Institute of Health (the “**BLL Reports**”)—both submitted jointly with its letter—and to use them in expert examinations (the “**Rebuttal Evidence Request**”). The Claimant asserts that the SVS Report and the BLL Reports rebut arguments contained in Mr. Dobbelaere’s and Ms. Proctor’s second expert reports, respectively, which were not included in their first reports. The Claimant further requested that the hearing time be extended by two hours so the Parties and their experts could address matters related to the mentioned documents.
- 1.6 By letter dated 12 February 2024, the Tribunal invited the Respondent’s comments regarding the Rebuttal Evidence Request and on whether to increase the maximum time for experts’ presentations without increasing the total time allocated to each side (the “**Time Extension Proposal**”), clarifying that “the already agreed hearing time cannot be modified” and that “the Claimants have ample time from the present until the hearing date to organize their case within the allocated timeframe.”

- 1.7 By letters dated 14 February 2024, the Respondent submitted, *inter alia*, its response to the Rebuttal Evidence Request and to the Time Extension Proposal, and a request to prevent Sarah Warburg-Koechlin, a King & Spalding attorney included in the Claimant's final list of participants for the Hearing, from attending the Hearing in person or remotely (the "**Exclusion Request**").
- 1.8 Regarding the Rebuttal Evidence Request, the Respondent argued (i) with respect to both documents, that paragraphs 6.4, 6.5, and 9.1(e) of Procedural Order No. 1 of both Cases require a showing of exceptional circumstances for the admission of post-pleading evidence, which the Claimant did not allege exist; (ii) with respect to the SVS Report, that (a) the Claimant had an appropriate opportunity to respond to Mr. Dobbelaere's findings regarding the main stack emissions data given that he made them since his first report; and (b) the Claimant had had the SVS Report since the *Renco I* arbitration but opposed that the entire record of that case be automatically admitted into the record of this case; and (iii) with respect to the BLL Reports, that (a) the BLL Reports were produced by the Respondent during document production and could have been used by the Claimant in its Reply or by Dr. Schoof or Mr. Connor in their second expert reports but were not; (b) in accordance with paragraph 9.5 of Procedural Order No. 11, the Claimant and its experts are precluded from responding to Ms. Proctor at the Hearing with post-pleading arguments and exhibits. Accordingly, the Respondent also rejected the Time Extension Proposal.
- 1.9 Regarding the Exclusion Request, the Respondent asserted that (i) under the Hearing Procedural Orders, only "Participants" or "Remote Participants" may attend the Hearing, and Ms. Warburg-Koechlin is neither because she has not entered an appearance as counsel; (ii) her appearance raises concerns regarding due process, equality of arms, and the integrity of the proceedings; and (iii) neither the Tribunal nor Claimant's experts have conducted conflicts checks.
- 1.10 By letter dated 19 February 2024, the Claimant replied to the Respondent's comments on both Requests.
- 1.11 Regarding the Rebuttal Evidence Request, the Claimant contended that (i) its request was based on paragraph 9.5 of the Hearing Procedural Orders, and not paragraph 6.4 of Procedural Order No. 1 of both Cases, such that no showing of exceptional circumstances is required; (ii) the Request complies with paragraph 9.5 since the rebuttal evidence relates to new evidence or arguments submitted in Mr. Dobbelaere's and Ms. Proctor's second expert reports after Mr. Connor and Dr. Schoof submitted their last reports; (iii) the SVS Report and the LLB Reports are not new evidence but rebuttal or impeachment evidence that does not unfairly surprise the Respondent.
- 1.12 Regarding the Exclusion Request, the Claimant submitted that (i) it has no basis in the procedural rules; (ii) the Respondent has not presented any insurmountable issues, considering that Ms. Warburg-Koechlin would have access to the live stream in any case and would be agreeable to the confidentiality provisions and other procedural rules binding the Parties; and (iii) the Claimant has an interest in having her present.

2 Analysis

- 2.1 The Claimant submits a Rebuttal Evidence Request to include the SVS Report and the LLB Reports into the record and to use them during expert examinations, as well as a request to extend the allocated Hearing time. The Respondent submitted an Exclusion Request to prevent

Ms. Warburg-Koechlin from attending the Hearing. Both Parties opposed each other's requests, which the Tribunal will address in turn.

Rebuttal Evidence Request

- 2.2 As a preliminary matter, the Tribunal clarifies that the provisions applicable to the Rebuttal Evidence Request are paragraphs 6.4 and 6.5 of Procedural Order No. 1 of both Cases, and not paragraph 9.5 of the Hearing Procedural Orders as proposed by the Claimant.
- 2.3 Paragraphs 6.4 and 6.5 pertain to instances in which a party intends to introduce evidence not previously on the record, after their last written submission and before the Hearing. In the present matter, the Claimant requested leave to include the SVS Report and the LLB Reports into the record a few weeks prior to the Hearing, neither of which had been previously filed with any of its written submissions. This falls precisely within the parameters of the aforementioned provisions.
- 2.4 Conversely, paragraph 9.5 does not authorize nor relate to the introduction of new rebuttal evidence but merely addresses the scope of expert testimony, permitting experts to address certain matters falling outside the scope of their prior expert reports on the basis that those matters were raised after the submission of their last expert report. This provision must be read in conjunction with paragraph 9.1(e) of Procedural Order No. 1 of both Cases and paragraphs 13.1 and 13.5 of the Hearing Procedural Orders, which prohibit Parties from submitting new evidence during the Hearing, including as demonstrative exhibits, unless the Tribunal grants leave pursuant to paragraph 6.4 of Procedural Order No. 1 of both Cases.
- 2.5 Accordingly, under the applicable provisions, the Claimant can only submit new evidence of any kind, regardless of whether it is characterized as “rebuttal” or “impeachment” evidence, by “justifying why such documents were not submitted earlier together with the Parties’ written submissions” (paragraph 6.4) or on the basis of “exceptional circumstances” (paragraphs 6.4 and 6.5). Although, as pointed out by the Respondent, the Claimant failed to present any arguments or evidence demonstrating the existence of exceptional circumstances and even admitted to not following said standard, it did present arguments justifying why it did not file the SVS Report or the LLB Reports with any of its written submissions. The Tribunal will assess these arguments regarding each document.
- 2.6 In relation to the SVS Report, the Tribunal notes that Mr. Dobbelaere indicates in his first expert report that the Claimant did not offer an explanation for the drop in sulfur dioxide and lead stack emissions between 1999 and 2000 and suggests their shift to other outlets as the likely explanation.¹ However, in his second expert report, Mr. Dobbelaere then labels these reductions as “impossible” and an “error” and proffers two additional possible explanations: wrong measurement of concentration of sulfur dioxide in process gas exiting the main stack and wrong measurement of the flow rate. He further asserts for the first time that either of these two explanations would render the whole emissions data unreliable.²
- 2.7 While Mr. Dobbelaere had raised concerns regarding the drop in the main stack data in his first expert report, it was not until his second expert report that he questioned the data, its veracity and reliability, and the measurements on which it was based. The Claimant argues that the SVS Report explains the precise measurement methodology used during those years, and the Tribunal considers that this *prima facie* represents evidence directly related to Mr. Dobbelaere’s analysis

¹ Wim Dobbelaere First Expert Report, 1 April 2022, ¶¶ 240-242, 258-259.

² Wim Dobbelaere Second Expert Report, 1 September 2023, ¶¶ 234-241.

in his second expert report that was not present in his first expert report, which explains why no evidence such as the SVS Report was filed at the time of the Reply.

- 2.8 In relation to the LLB Reports, the Tribunal notes that Ms. Proctor presented in her first expert report an Integrated Exposure Uptake Biokinetic Model to predict blood lead levels in children from exposure to soil alone and her corresponding findings, which she later defended in her second expert report.³ By the Claimant's own admission, it intends to include the LLB Reports into the record to rebut Ms. Proctor's justifications in support of her model and her conclusion that lead exposure to soil alone would be insufficient to raise children's blood lead levels above 10 µg/dL, both of which were found in her first expert report. Additionally, the Respondent argued that the Claimant had access to the LLB Reports since document production and the Claimant did not dispute this nor explain why this document could not have and should not have been submitted with its Reply or second expert reports. The request to introduce the LLB Reports is therefore denied.
- 2.9 In light of the above considerations, the Tribunal grants the Rebuttal Evidence Request in relation to the SVS Report. Accordingly, the Claimant is requested to submit the SVS Report as an exhibit and an updated cumulative index of exhibits and legal authorities for both Cases by **Tuesday, 27 February 2024**. Moreover, pursuant to paragraphs 6.4 and 6.5 of Procedural Order No. 1 of both Cases, the Respondent is invited to present any counter-evidence by **Thursday, 29 February 2024** and to make any observations it may have concerning the SVS Report in writing by the same date and/or orally at the Hearing.
- 2.10 As noted, the Tribunal rejects the Rebuttal Evidence Request in relation to the LLB Reports. Therefore, the arguments presented in the Claimant's letters dated 9 and 19 February 2024 based on the content of the LLB Reports and corresponding Exhibits C-S—which the Claimant admitted were improperly submitted—shall not be considered as part of the record, and the Parties or their experts may not refer to them during these proceedings.
- 2.11 This decision does not preclude the Claimant and its experts from addressing any points they consider relevant from Ms. Proctor's second expert report during testimony at the Hearing, but when doing so, they “may not produce or rely on argument or evidence not previously discussed or submitted in the written submissions”.⁴

Exclusion Request

- 2.12 The Tribunal does not find that the Respondent has presented any compelling reason to exclude Ms. Warburg-Koechlin from the Hearing and, thus, rejects the Exclusion Request. Nonetheless, considering the concerns that the Respondent raised, the Tribunal confirms that Ms. Warburg-Koechlin shall be deemed to be a Participant under the Hearing Procedural Orders and, consequently, is bound by the procedural rules applicable to them (as are all other Hearing attendees) and to all other Party representatives, including those rules on confidentiality. The Tribunal further notes that there are a number of additional representatives of the Respondent included on the Respondent's list of participants, who were also not previously on record in this arbitration, to whom the same rules would apply.
- 2.13 The members of the Tribunal take the opportunity to advise that they have conducted a conflict check concerning Ms. Warburg-Koechlin and all other new representatives for both sides, and

³ Deborah Proctor First Expert Report, 31 March 2022, pp. 11-12, 22 *et seq.* See generally Deborah Proctor Second Expert Report, 1 September 2023.

⁴ Hearing Procedural Orders, ¶ 9.5.

confirm that no conflicts arise therefrom, nor are there any circumstances that any of them need to disclose.

Time Extension Proposal

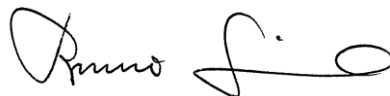
2.14 The Tribunal reaffirms its statement in its letter dated 12 February 2024 that “the already agreed hearing time cannot be modified.” In light of the Respondent’s rejection of the Time Extension Proposal, the Tribunal confirms that the time allocated for experts’ presentations (in lieu of direct examination) set forth in the Hearing Procedural Orders remains unchanged.

3 Decision

3.1 Having considered the views expressed by the Parties and for the reasons given above, the Tribunal hereby decides to:

- 3.1.1. grant the Rebuttal Evidence Request in relation to the SVS Report;
- 3.1.2. deny the Rebuttal Evidence Request in relation to the LLB Reports;
- 3.1.3. deny the Exclusion Request; and
- 3.1.4. confirm that the time allocation set out in the Hearing Procedural Orders remains unchanged.

So ordered by the Tribunal.



Judge Bruno Simma
(Presiding Arbitrator)